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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 148 [redacted] 132

P. M. NESBITT

vs.

EDWIN GILL, COMMISSIONER OF REVENUE

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1489

P. M. NESBITT

vs.

EDWIN GILL, COMMISSIONER OF REVENUE

STATEMENT AGAINST JURISDICTION

Edwin Gill, Commissioner of Revenue of the State of North Carolina, the appellee in this appeal from the Supreme Court of North Carolina, files herewith a statement of matters and grounds making against the jurisdiction of this Court as provided by Rule 12 of this Court.

The appellant relies upon four asserted violations of the United States Constitution by the North Carolina taxing statute. These will be considered in this Statement in the order in which they are listed in the appellant's Assignment of Errors.

The appellee submits that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I

The appellant asserts that the taxing statute violates the interstate commerce clause because, in addition to the annual license tax on dealers in horses and mules, it imposes

a tax of $3.00 per head on horses and mules purchased for resale, "which additional per head tax only first dealers or consignees receiving horses or mules within the state are absolutely required to pay and from which tax subsequent purchasers for resale or otherwise are relieved, thereby in practical operation and effect exacting an entrance duty, excise or tariff of horses and mules purchased in interstate commerce for import into a non-stock raising state."

This contention involves no substantial federal question. The Supreme Court of North Carolina has held in this case that the additional per-head tax is neither a property tax nor a tax upon the right to purchase, but that it is a tax upon the local privilege of dealing in horses and mules, measured by the amount of purchases for resale in the state. This Court is bound by that construction of the statute. Therefore, the tax is not an "entrance duty" on horses and mules imported into North Carolina from other states.

This Court considered a similar question in *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233. There it appeared that a Kentucky statute imposed a tax on "the receipt of cosmetics in the state by any Kentucky retailer." The appellant contended that the statute was invalid as applied to articles purchased by the retailer from dealers outside the state, because the tax was laid on "the act of receiving" goods shipped into the state and was, therefore, a direct burden on interstate commerce. The state court had construed the statute as placing the tax, not on the actual receipt of the goods, but on the sale and use of the goods after they had come into the retailer's hands. On appeal to this Court it was held that no substantial federal question was involved because this Court was bound by the construction placed on the statute by the state court and because, in the light of that construction, the state court

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had applied correct principles as declared in this Court's decisions.

The tax imposed by this statute does not constitute any more an "entrance duty" or burden upon interstate property than does a tax imposed upon the "use" of property after its interstate journey has ceased.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814;

Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888;

Monomotor Oil Co. v. *Johnston*, 292 U. S. 86, 78 L. Ed. 1141;

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 76 L. Ed. 1232.

Or a sales tax imposed on the delivery within the state of property which has been transported in interstate commerce and has been brought to its journey's end.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565.

Or an occupation tax upon a dealer in property which has been transported into the state from other states and subsequently sold.

Sonneborn Bros. v. *Cureton*, 262 U. S. 506.

Or a property tax imposed by the state of destination on property at the conclusion of its interstate journey.

Brown v. *Houston*, 114 U. S. 622, 29 L. Ed. 257;

Robbins v. *Taxing District*, 120 U. S. 489.

For purposes of the interstate commerce clause there is no distinction between a tax on property and a tax on the license to sell such property.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565.

Thus, it is clear that the tax imposed by this statute cannot be a burden on interstate commerce, or an "entrance duty" on interstate property, for the tax is upon the privilege of dealing in that property after its interstate journey has ended.

This disposes of the appellant's contention that the tax is an "entrance duty" on horses and mules imported into North Carolina from other states. However, the appellant's assignment of error refers to that provision of the statute which provides that the first dealer purchasing horses and mules for resale in North Carolina shall be primarily liable for the additional per-head privilege tax and that, *in order to avoid double taxation*, dealers purchasing horses or mules from another dealer who has once paid the additional per-head tax as to those horses or mules shall be exempt from said additional per-head tax. If the appellant is suggesting that this exemption of subsequent dealers from the additional per-head tax discriminates against interstate commerce because the exempted subsequent dealers purchase in intrastate commerce, there still is no substantial federal question involved.

Under the construction placed on the statute by the Supreme Court of North Carolina *the per-head tax is imposed as to a particular horse or mule only one time*, regardless of whether that horse or mule comes to the first dealer from local sources or from interstate commerce. Thus, if the first dealer pays the per-head tax, the subsequent dealer is exempt. Each horse or mule, whether its origin is within or without the state, carries the burden of only one per-head tax. Under these circumstances there can be no greater burden on interstate commerce than on local commerce.

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"A tax or other burden obviously does not discriminate against interstate commerce where equality is its theme."

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814;

Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888.

If the per-head tax were also levied against every subsequent dealer in the same horse or mule, there would be obvious discrimination against local commerce, for each successive local sale of the horse or mule would increase, the tax burden by swelling the price until, finally, further trading in the horse or mule would be prohibited by the accumulated tax burden in the purchase price, whereas a horse or mule purchased in interstate commerce would carry the burden of only a single levy. Therefore, the exemption of the subsequent dealers in the same horse or mule in reality prevents a discrimination against local commerce which would otherwise result from a pyramiding of the tax burden. Under the statute, whether the horse or mule enters commerce from local or interstate channels, the exemption of subsequent dealers in the same horse or mule insures that the tax burden will remain the same.

In this view of the matter it is not important that the first dealer, who is primarily liable for the per-head tax, happens to derive his horses and mules from interstate commerce while the subsequent dealer derives his horses and mules from local dealers. Irrespective of the animal's origin each animal is burdened with the per-head tax only one time. The tax is not laid on the first dealer "merely because interstate commerce is being done." The fact that he is engaged in interstate commerce is incidental. If the first dealer purchased all his horses and

mules from local breeders, he would still be primarily liable for the tax under the statute.

Under the commerce clause we are concerned with the practical operation of the statute, not its definition or precise form of descriptive words.

> *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888.

Discrimination against interstate commerce is a practical conception and must involve a substantial distinction and a real injury. The burden is always on the taxpayer to show that, whatever distinction there may exist in form, there is substantial discrimination in fact.

> *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 76 L. Ed. 1232.

In the case just cited it appeared that a South Carolina statute imposed a tax on the use of gasoline after its interstate character ceased. The statute exempted gasoline purchased from South Carolina dealers who had paid a license tax in the same amount under another statute which provided that the tax should be passed on to the consumer. The taxpayer contended that the statute discriminated against interstate commerce because it exempted gasoline purchased from local dealers. This Court held that the statute, when considered with the statute taxing dealers, did not discriminate against interstate commerce because, as a practical matter, the tax burden imposed by the two statutes was equal on both interstate and intrastate gasoline.

There can be no substantial discrimination against interstate commerce under this statute where each horse or mule, regardless of its origin, is burdened with one per-head tax, and no more.

This result is not altered by the fact that most of the horses and mules sold in North Carolina may be purchased by dealers in interstate commerce. If the exemption imposes any burden upon interstate commerce because of the fact that North Carolina imports most of its horses and mules from other states, such burden is an incidental consequence of the situation rather than a direct burden resulting necessarily from the operation of the statute.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547.

It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state's tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing business.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565.

Therefore, whether the appellant's contention be regarded as one which designates this tax as an "entrance duty," or one which complains of discrimination, no substantial federal question is involved.

II

The appellant asserts that the statute "imposes an unlawful burden upon interstate commerce by imposing a tax upon persons engaged in the business of purchasing horses and mules for the purpose of resale, which tax is made proportionate to the total number of horses and mules purchased, including horses and mules purchased in other states, without apportionment, thereby subjecting persons engaged in the business of purchasing for resale horses and mules in interstate commerce to the risk of a multiple tax burden."

Presumably this contention has reference, not to the additional per-head tax imposed by the statute, but to the annual license tax which is measured by the number of horses and mules purchased for resale within the state. However, if this contention has reference to both the annual tax and the per-head tax, the question involved is the same.

This contention involves no substantial federal question. The North Carolina Supreme Court has construed the statute as imposing the tax on local dealers in horses and mules for the privilege of engaging in the local business of dealing in horses and mules. The tax is not one on a purchase, interstate or local, or on the right to purchase. Since the tax is one laid upon a purely local business, the risk of multiple tax burdens is not involved.

It is firmly established by the decisions of this Court that the commerce clause does not prevent a state from taxing a local business which is separate and distinct from interstate commerce, even though the tax be measured in part by interstate transactions.

American Mfg. Co. v. *St. Louis*, 250 U. S. 459;
N. Y., L. E. & W. R. Co. v. *Pennsylvania*, 158 U. S. 431;
Utah P. & L. Co. v. *Pfost*, 286 U. S. 165;
Oliver Iron Min. Co. v. *Lord*, 262 U. S. 172;
Coverdale v. *Ark.-La. Pipe L. Co.*, 303 U. S. 604;
Ficklen v. *Taxing District*, 145 U. S. 1;
Western Livestock v. *Bureau of Revenue*, 303 U. S. 250.

The state court's construction of the statute is binding on this Court.

J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233.

The amount of purchases may properly be used as the measure of the tax upon the local privilege of dealing in the articles purchased.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547;

Albertson v. *Wallace*, 81 N. C. 479;
State v. *Stevenson*, 109 N. C. 730;
State v. *French*, 109 N. C. 722.

III

The appellant asserts that the statute "exempts purchasers of horses and mules from the payment of the additional tax of $3.00 per head upon horses and mules accepted in part payment of other horses and mules sold, thereby in practical operation and effect permitting and allowing an exemption to local horses and mules not granted to horses and mules produced in foreign states."

This contention involves no substantial federal question. The statute clearly grants this exemption to local and interstate horses and mules alike.

IV

The appellant asserts that the statute violates the due process clause because it "imposes a state tax upon a transaction consummated beyond the territorial limits of the State of North Carolina."

This contention involves no substantial federal question. The Supreme Court of North Carolina has held in this case that the tax is imposed on local dealers for the privilege of engaging in the local business of dealing in horses and mules. The tax is not one upon a purchase, either interstate or local.

MOTION TO DISMISS OR AFFIRM

For the reasons set out above the appellee submits that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. All of the constitutional questions raised by this appeal have been thoroughly argued, examined and decided in the Supreme Court of North Carolina. Although the appellant had the right to request a rehearing of this cause in the Supreme Court of North Carolina, he elected not to request such rehearing.

Therefore, the appellee respectfully moves the Court that this appeal be dismissed or affirmed.

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